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IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 554

JULIUS ARONOFF,

Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,

Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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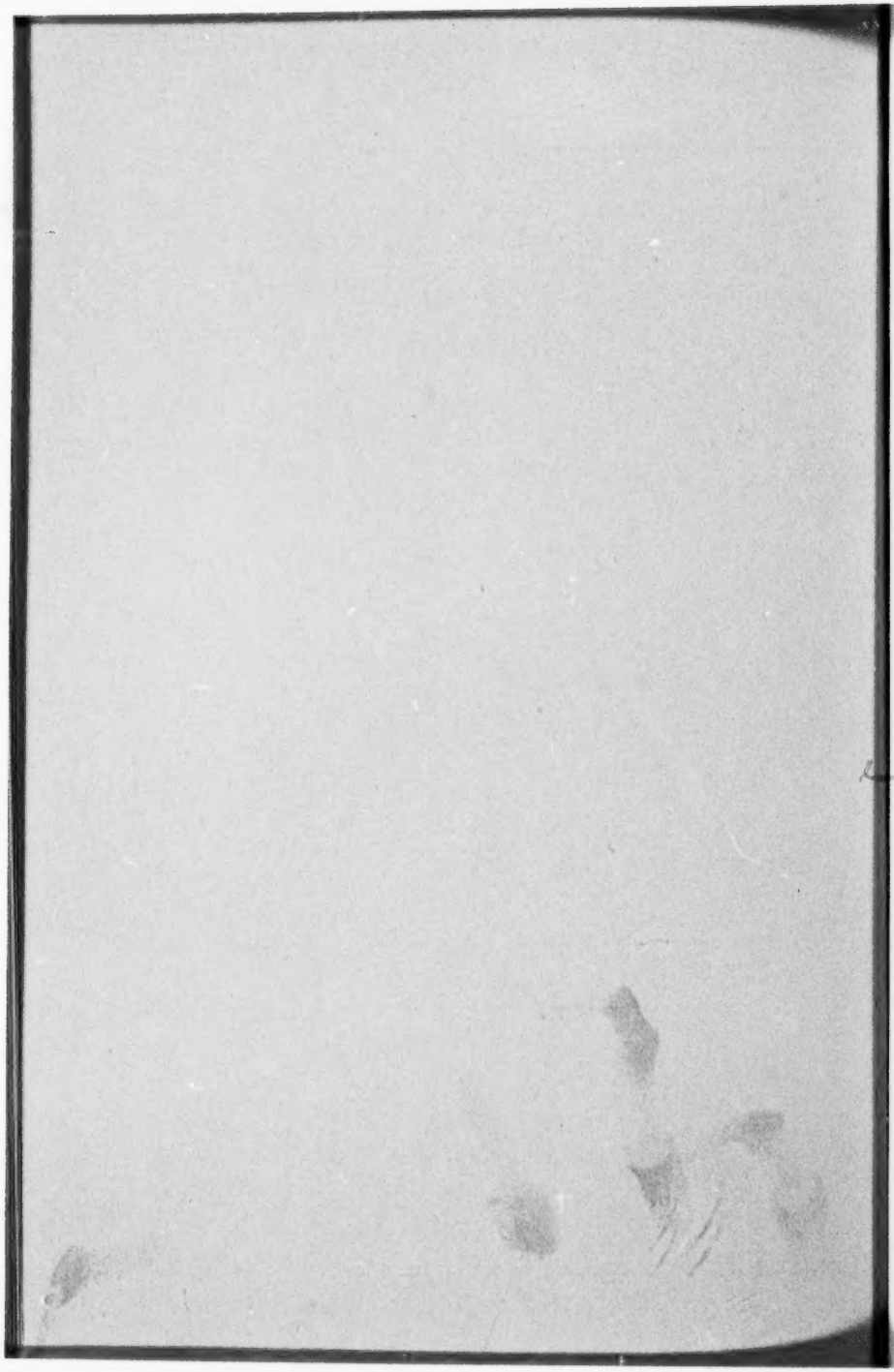

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Supreme Court of the United States:

The petition of JULIUS ARONOFF respectfully shows:

I

Summary Statement of the Matter Involved

Petitioner was convicted by a jury after a trial in the United States District Court for the Eastern District of New York upon an indictment containing three counts (R. 7-27) charging him and three others: (1) with conspiring to violate the Bankruptcy Act, 11 U. S. C. A., Section 52(b), Subdivisions 1, 2 and 6; (2) with the substantive violation of Section 52(b), Subdivision 1, of said Act; and (3) with the substantive violation of Section 52(b), Subdivision 6, of said Act.

The jury found petitioner guilty on the three counts of the indictment, with a plea of leniency (R. 494), and he was sentenced to two years' imprisonment on each count, the sentences to run concurrently (R. 43).

Petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit upon grounds fully set forth in the assignments of error (R. 538-552). Upon such appeal, said Circuit Court of Appeals affirmed petitioner's conviction and rendered its opinion thereon.

II

Jurisdiction to Review

The United States Circuit Court of Appeals for the Second Circuit made its order for mandate herein, affirming the conviction of the petitioner, on September 17, 1943. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. Code, Section 347, Subdivisions A and C, and as amended by Section 240(A) under the Act of February 13, 1925, and Rule 38 of the Revised Rules (1939) of the Supreme Court of the United States. The reasons directly hereinafter further set forth constitute valid grounds for invoking the jurisdiction of this Court.

III

Questions Presented

1. Whether or not there was evidence adduced upon the trial to prove any of the charges against petitioner, that is:

(a) That petitioner, knowingly and with criminal intent, entered into a conspiracy with others to transfer in anticipation of bankruptcy, and to conceal from its trustee in bankruptcy, property belonging to Famous Furniture Co. Inc., as charged in Count One of the Indictment.

(b) That petitioner, between March 1, 1940, and March 7, 1941, knowingly and fraudulently commenced to conceal, and between March 7, 1941, and November 6, 1942, the date of the filing of the indictment, knowingly and fraudulently concealed from the trustee in bankruptcy of Famous Furniture Co. Inc. property belonging to said bankrupt, as charged in Count Two of the Indictment.

(c) That, while Benjamin Goldberg and Harry Goldberg were officers of Famous Furniture Co. Inc., petitioner wilfully and fraudulently, in contemplation of proceedings under the Bankruptcy Act against said Famous Furniture Co. Inc., and with intent to defeat the Bankruptcy Act, aided and abetted said Benjamin Goldberg and Harry Goldberg in transferring property of said Famous Furniture Co. Inc., as charged in Count Three of the Indictment.

2. Whether or not evidence tending to show petitioner dealt with property ostensibly belonging to B. Glass Inc., a corporate entity distinct from Famous Furniture Co. Inc., the bankrupt, sustained any of the foregoing charges of the Indictment, notwithstanding that there was evidence adduced from which it might be assumed that said B. Glass Inc. was in some way, undefined and unproved, connected or associated with Famous Furniture Co. Inc., said bankrupt.

3. Whether or not evidence tending to show that petitioner and another purchased property in which Famous Furniture Co. Inc. may have had an equity (depending upon assumptions to be drawn from the evidence), and thereafter failed or refused to pay therefor, was sufficient to sustain any of the foregoing charges made in the Indictment.

4. Whether or not the charge of the Trial Court precluded petitioner from his constitutional right to a trial by jury in that, although there were clear issues of fact as to all such matters, it in effect instructed the jury to take

as facts established that the property involved was property of Famous Furniture Co. Inc., and that the dealings alleged to have been had by petitioner with respect thereto were criminal dealings as charged in the Indictment; and in that it in effect submitted to the jury as the sole test of petitioner's guilt or innocence the question of whether or not petitioner had in fact participated in said alleged dealings.

5. Whether or not the evidence adduced at the trial was sufficient to support the finding of guilt as to the petitioner, Julius Aronoff, and whether or not the affirmance of conviction by the Circuit Court of Appeals is not in direct conflict with applicable decisions of this Court, and has decided a Federal Question in a way probably in conflict with applicable decisions of this Court, or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, particularly with respect to that part of the decision of affirmance which states that the probability was strong that the mortgagee would not have lent $5,000 unless there had been a substantial equity, which is wholly in conflict with the evidence and the applicable rules of law with respect to such evidence required in a criminal case; and with respect to the failure of the Trial Court and the Circuit Court to afford the petitioner a full and fair trial of all the issues presented by the evidence, thus depriving him of his constitutional rights to a fair trial by jury.

IV

The Reasons Relied on for the Allowance of the Writ

A. The evidence adduced to sustain the charges against petitioner was that: Petitioner's co-defendants Benjamin Goldberg and Harry Goldberg were the president and vice-president, respectively, of Famous Furniture Co. Inc.,

a corporation conducting a retail furniture store in Brooklyn, New York (R. 25). Benjamin Goldberg had acquired the assets of the corporation in 1939 (R. 231).

Some time later, according to Benjamin Goldberg's testimony for the Government, he acquired B. Glass Inc., a corporation engaged in conducting a retail furniture store in Suffern, New York, "in a form of a purchase" (R. 232). When asked if that was connected with Famous Furniture Co. Inc., the witness replied, "Everything that Ben Goldberg did was on behalf of the Famous Furniture Co." (R. 232).

It appeared from the testimony that on December 17, 1940, before petitioner met the Goldbergs, the Goldbergs held an auction sale at the premises of B. Glass Inc. at Suffern and sold all of the merchandise in the Suffern store (R. 56-57). Within a few days thereafter the Goldbergs restocked B. Glass Inc. with furniture, trucked to Suffern from Famous Furniture Co. Inc. in Brooklyn (R. 89-92). The Government's evidence as to the value of this furniture was conflicting, the witness Goldberg testifying that he restocked B. Glass Inc. with about $15,000 worth of furniture (R. 240), although the books of Famous Furniture Co. Inc., which the witness maintained were correct (R. 285), showed shipments of merchandise to B Glass Inc. of the value of $4,514.30 only (R. 329).

In any event, on January 7, 1941, Goldberg borrowed $5,000 from Majestic Factors Corporation, secured by the furniture and assets of B. Glass Inc. (R. 80-81, 240). The loan was made "on the basis that the assets of B. Glass Inc. were transferred to the Majestic Factors Corporation and all income of B. Glass Inc. was to be turned over to the Majestic Factors in reduction of the loan" (R. 81-82).

After the Government's witness Goldberg had restocked B. Glass Inc., and had transferred its assets to Majestic Factors Corporation in consideration of the foregoing loan, he opened negotiations through Newman to sell the entire stock of B. Glass Inc. (R. 235-236, 291-293). When it

appeared to the witness that he would not be able to realize enough on the sale to leave him with any cash after repayment of the loan to Majestic Factors Corporation, he dropped the negotiations with Newman (R. 235-236).

It was at this juncture that petitioner first met the witness Goldberg (R. 236-237). Petitioner had been active in various phases of the furniture business for many years (R. 363), and among other things had been in the habit of introducing buyers to furniture dealers on a commission basis (R. 366). According to the testimony of the Government's witness Goldberg, petitioner had learned of Goldberg's efforts to sell the stock of B. Glass Inc. and suggested that he had a wealthy friend with whom Goldberg might be able to do business (R. 236-237). The testimony then went on to the effect that the petitioner introduced the witness to the co-defendant Meyer Greenberg (R. 238) and, after some discussion, a sale was agreed upon whereby the witness agreed to sell to Greenberg and petitioner, and they agreed to purchase, all of the merchandise on the top floor of B. Glass Inc. (R. 242-243, 248).

In consummation of the alleged sale, the witness Goldberg instructed an employee at B. Glass Inc. to give petitioner and Greenberg all of the merchandise above the first floor (R. 243-249). The employee thereafter delivered the keys to co-defendant Greenberg (R. 108), who caused some of the furniture to be removed from the premises of B. Glass Inc. to the premises of the Bergen Furniture Co. in Brooklyn, New York (R. 116-120, 347). However, for some unexplained reason, at least two or three lots of the furniture removed were returned to the warehouse of Famous Furniture Co. Inc. in Brooklyn (R. 120).

Both the said employee and the truckman who carted the furniture testified that petitioner took no part in the removal thereof and that the entire transfer was made at the order and direction and under the supervision of the defendants Goldberg and the defendant Meyer Greenberg. Petitioner at no time exercised any supervision over,

or interest in, the transfers, or in the furniture that was the subject matter thereof (R. 116-117, 123-124, 132-133, 135-138, 349-353).

One of the truckmen testified that in addition to the furniture carted from B. Glass Inc. to Bergen Furniture Co. he delivered some furniture from the place of business of Famous Furniture Co. in Brooklyn to Bergen Furniture Co. (R. 123). These shipments were supervised and directed by defendants Goldberg and Greenberg and it does not appear that petitioner in any way participated therein or in fact had any knowledge thereof (R. 124).

It is conceded that at the time of these transactions petitioner was employed as a salesman by Bergen Furniture Co., but, although the Government made an attempt to show that petitioner had some kind of a proprietary interest in the Bergen, nothing appeared except the testimony of the co-defendant Goldberg to the effect that petitioner told him he had money invested in the business (R. 260). As opposed to this, other Government's witnesses testified that they knew petitioner only as a salesman for Bergen and that Moe Rosenberg and Victor Rosenberg were the owners and officers of that corporation (R. 132, 334-335, 353).

As appears, all of the foregoing transactions took place at the end of December, 1940, and in January, 1941. On March 7, 1941, an involuntary petition in bankruptcy was filed against the Famous Furniture Co. Inc. (R. 51), and it was adjudicated a bankrupt on March 29, 1941, and a trustee of the bankrupt estate was appointed on August 21, 1941 (R. 52).

Petitioner submits that the foregoing testimony adduced against him upon the trial was not sufficient to establish that he had any dealings with property belonging to the bankrupt, Famous Furniture Co. Inc., and that consequently, in the absence of such proof, the charges against him were not sustained. In this connection the testimony of the Government's witnesses not only failed to show, by

direction or indirection, that title to the property remained in Famous Furniture Co. after its transfer to B. Glass Inc., but that testimony went even further and established affirmatively that once the property entered the premises of B. Glass Inc. it was treated and considered for all purposes as property owned by that distinct corporate entity.

In addition, it was shown that, having attained the status of property of B. Glass Inc., the furniture was in turn transferred by B. Glass Inc. to still another corporate entity, namely, Majestic Factors Corporation. With respect to this last transfer of title it is pointed out that there is no clear proof that B. Glass Inc. retained any equity in the property thereafter, for, with the exception of the general statement of the witness Goldberg that the property was then worth about $15,000, there was nothing to contradict the evidence on the books of Famous Furniture Co. Inc. that the property was worth only $4,514.30, or something less than the amount of the loan to secure which the property was transferred.

Furthermore, even if it be assumed for the purpose of argument that Goldberg's testimony as to the value was correct or approximately so, the whole evidence clearly shows that Greenberg and petitioner purchased only a part of the merchandise, that is to say, the part on the upper floor; that more than $5,000 worth was not included in the sale and remained on the lower floor; and that of the merchandise on the upper floor, which Goldberg evaluated at $8,500, only a part was taken by Greenberg and petitioner, whereas about one-third was returned to the warehouse of Famous Furniture Co. Inc. in Brooklyn (R. 120).

It appears clear, therefore, that there was no evidence that Famous Furniture Co. Inc. owned or had any equity in the property claimed to have been transferred from the premises of B. Glass Inc. in Suffern to the place of business of Bergen Furniture Co. in Brooklyn.

Nor can petitioner's conviction rest upon the testimony incidentally given by one of the Government's witnesses that certain other property was transferred from the place of business of Famous Furniture Co. Inc. in Brooklyn to the premises of Bergen Furniture Co., for the testimony is explicit that this entire transaction was carried on by the Goldbergs and by Greenberg, and the record is barren of anything that would tend to show that petitioner participated in or had an interest in this particular transfer, or, indeed, that he had any knowledge thereof.

The foregoing failures of proof necessarily required the dismissal of the charges against the petitioner and his conviction on said charges was consequently contrary to law.

B. Assuming, though by no means conceding, that Famous Furniture Co. Inc. was shown to have had some property interest in the merchandise of B. Glass Inc., the fact remains nevertheless that there is no evidence in the record to show that petitioner knew of any such interest in Famous Furniture Co. Inc. So far as appears, when petitioner first came upon this merchandise it was in the premises of B. Glass Inc. in Suffern, New York, and the defendant Goldberg, the proprietor of B. Glass Inc., was making efforts to sell it. It is true that the Government's witness the co-defendant Goldberg went to great pains in his testimony in an effort to show by statement and by inference that petitioner's alleged subsequent dealings with respect to this furniture were had with an improper motive and for an unlawful purpose, but, even conceding all this to be true, for aught that appears by the record the petitioner's activities were concerned with property which petitioner had every right to believe belonged to B. Glass Inc., a corporation that never became a bankrupt.

It is respectfully submitted that on this state of the record the evidence does not sustain charges that petitioner knowingly and fraudulently transferred or concealed, or con-

spired knowingly and fraudulently, to transfer and conceal, property belonging to Famous Furniture Co. Inc., for it is evident that in the absence of evidence to show petitioner knew the property with which he was dealing belonged to Famous Furniture Co. Inc. he could not "*knowingly*" have committed any of the acts charged; nor could his dealings have been said to have been had in contemplation of a proceeding under the Bankruptcy Act against Famous Furniture Co. Inc., or in an attempt to defeat the provisions of the Act.

C. In any event, the Government's evidence, reduced to its essence and taken at its face value, showed conclusively that petitioner and Greenberg bought the merchandise on the top floor of the premises of B. Glass Inc. and agreed to pay a stated consideration therefor, to wit, 90% of its estimated value of $8,500. The question is thus posed as to whether or not evidence that petitioner and another, regardless of with what motives, purchased the property and after having received at least a part of it defaulted in paying the agreed purchase price, was evidence sufficient to prove petitioner's guilt of the charges of concealing, transferring and conspiring to conceal and transfer in anticipation of bankruptcy property which belonged to Famous Furniture Co. Inc.

It is respectfully submitted that the question thus presented must be answered in the negative and that petitioner's conviction upon such evidence was contrary to law.

D. The Learned Circuit Court of Appeals below, in its opinion affirming petitioner's conviction while conceding the seriousness of the foregoing doubts as to the sufficiency of the evidence against petitioner, and particularly the doubt as to whether or not Famous Furniture Co. Inc. had any interest or equity in the furniture in question, proceeded to render its affirmance upon assumptions which it apprehended might be taken from the record, although

in fact the record afforded no basis for the same. Thus the learned Circuit Court, in affirming the conviction, said:

> "Assuming the correctness of this position, i.e., that in order to charge the appellant (petitioner), it was necessary to show that the bankrupt had some equity in Suffern, furniture, there was nevertheless, a clear issue of fact to be decided; and the probability was strong that the mortgagee would not have lent $5000.00 unless there had been a substantial equity. Moreover, quite independently of this transfer, the other Goldberg transferred a substantial parcel of goods from the Famous Furniture Co. in Brooklyn, directly to Greenberg at the premises of the Bergen Furniture Co., and the appellant was implicated in this transfer as well as in that from Suffern."

Thus the learned Circuit Court affirmed on two grounds: the first a bare assumption, not in anywise established to be a fact, that the property in the Suffern store must have been worth more than the amount of the loan from Majestic Factors Corporation, because, if it had not been, the loan would not have been made on its security. It is obvious that the loan very well may have been made on inadequate security, and to base a conviction of petitioner upon a bare assumption that it was not, is clearly improper and wholly unjustified.

Moreover, considered in the light of the proof that but a fraction of the furniture at the premises of B. Glass Inc. went to petitioner and Greenberg, the assumption made by the Circuit Court is even less warranted.

The second point mentioned in the opinion was the direct transfer from Famous Furniture Co. Inc. to Greenberg at the premises of Bergen Furniture Co. The Circuit Court took it that this transfer alone was sufficient to sustain the charges made in the indictment, although there was not an iota of evidence in the entire case to show, the learned Circuit Court to the contrary notwithstanding, that petitioner was implicated in this transfer or that he ever had the slightest knowledge that such a transfer took place.

E. The learned Circuit Court, in its opinion hereinabove quoted in part, expressly recognized that there were issues involved that required determination by the jury, in addition to the bare question of whether or not petitioner participated in the transactions described by the Government's witnesses. For example: with respect to the question of whether or not Famous Furniture Co. Inc. or its trustee in bankruptcy had any interest in the Suffern furniture involved in these transactions, the learned Circuit Court below said, "There was nevertheless, a clear issue of fact to be decided; * * *".

It is submitted, however, that the learned Trial Judge in his charge to the jury (R. 467-490) omitted entirely to present these issues to the jury for its determination. On the contrary, it is clear from the text of the charge that the Trial Judge submitted, and the jury was given to understand, that there was but one issue to be determined by them, namely: the issue of whether or not petitioner participated in the transactions described by the witnesses; and the jury was told in effect that if such participation were established to their satisfaction they must bring in a verdict of guilt.

More specifically, after discussing generally the charges made in the indictment and the statutes applicable, and after giving a resumé of the evidence, the Court framed the issue for the jury's consideration in the following words:

> "Now as against the testimony of the Government's witnesses, you have the testimony of the defendant, Aronoff, first, that he had no financial interest in the Bergen Furniture Co.; that such services that he performed for that company were solely those of a salesman and that in the conference that took place between Goldberg, who was the President of the Famous Furniture Co., and Greenberg, he did not participate. He says that he was shoved off to one side and did not hear and was not permitted to hear what they discussed.

That is the issue with respect to the participation of the defendant Aronoff in the conspiracy and in the acts that are the subject of counts two and three" (R. 487-488).

The foregoing were the Court's closing words to the jury. That these words excluded from the jury's consideration all questions except the question of whether petitioner in fact participated in the transactions described is so obvious as to require no comment. In view of this fact, and of the fact that there were other issues in the case clearly recognized by the learned Circuit Court below, any one of which other issues, if determined by the jury in the negative, would have required a verdict of not guilty, it is patent that petitioner was deprived by the Judge's charge of his constitutional right to have the charges made against him tried fully by a jury of his peers.

It is respectfully submitted, in view of all of the foregoing, that the submission of the charges against petitioner to the jury was improper in form and in substance and that both the jury's verdict of guilt and the affirmance of the conviction by the learned Circuit Court below were made without any basis in the evidence and should be reviewed and reversed in toto.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, directing said Court to certify and send to this Court a full and complete transcript of the records and proceedings of the said Circuit Court had in the case numbered and entitled on its Docket No. 18749, Calendar No. 36, October 1943 Term, United States of America, Appellee, v. Julius Aronoff, Appellant, to the end that the case may be reviewed and determined by this Court as provided for by the statute of the United States, and that judgment herein of said Circuit Court of Appeals be reversed by this Court, and

for such other and further relief as to this Court may seem proper.

Dated: December 16, 1943.

JULIUS ARONOFF,

By.....

CHARLES V. HALLEY, JR.,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. .....

JULIUS ARONOFF,
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against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Courts Below

There was no opinion rendered by the Trial Court relating to the within petitioner. The opinion of the Circuit Court below (R. 189), rendered on October 29, 1943, is still unreported.

II

Jurisdiction

The Court is respectfully referred to Subdivision II of the petition (supra, p. 2) on the question of jurisdiction. Said Subdivision II is herewith adopted and made a part of this brief.

III

Statement of the Case

A statement of the case has been made in the preceding petition under I (pp. 1 and 2), which is hereby adopted and made a part of this brief.

IV

Specification of Errors

The errors relied upon are those set forth in the questions presented in paragraph III of the foregoing petition, which are hereby adopted and made part of this brief.

V

Statutes and Regulations Involved

The statutes and regulations involved are set forth in the appendix.

ARGUMENT

A

In order to sustain the charges against the petitioner the burden rested squarely upon the Government to prove that this petitioner:

(1) knowingly and with a criminal intent entered into an unlawful conspiracy with the other defendants to transfer in anticipation of bankruptcy and to conceal from the trustee in bankruptcy property which belonged to the Famous Furniture Co. Inc. (Count One);

(2) knowingly and fraudulently, with the other defendants, and between the 1st day of March, 1940 and the 7th day of March, 1941, commenced to conceal and between the 7th day of March, 1941 and the date of the filing of the indictment fraudulently concealed from the trustee in bankruptcy property belonging to the Famous Furniture Co. Inc. (Count Two);

(3) while the defendants Benjamin Goldberg and Harry Goldberg were officers of the Famous Furniture Co. Inc., and with the other defendants, wilfully and fraudulently, in contemplation of a proceeding under the National Bankruptcy Act against the Famous Furniture Co. Inc., and with intent to defeat the National Bankruptcy Act, transferred property of the Famous Furniture Co. Inc. (Count Three).

In connection with all of the crimes alleged in the indictment the Government was required to establish the following necessary elements:

1. Proof that the property involved was the property of the Famous Furniture Co. Inc.

2. Proof that the petitioner had actual knowledge of a scheme to dispose of or transfer part of the property of the Famous Furniture Co. Inc. in contemplation of bankruptcy.

3. Proof that the petitioner with intent to abet the crimes charged in the indictment aided in the transfer of the property of the Famous Furniture Co. Inc. with the knowledge on the part of the petitioner that the bankruptcy of the Famous Furniture Co. Inc. was contemplated and that the property was to be concealed from the trustee.

United States v. *Yasser*, 114 F. (2d) 558.

It would be superfluous to state that if the property allegedly concealed or transferred was not the property

of the bankrupt, Famous Furniture Co. Inc., then the crimes alleged were not proven.

United States v. *Knopfer*, 12 F. Supp. 980.

A significant feature about this entire record is the fact that there is no evidence of any probative value that the property involved actually belonged to the Famous Furniture Co. Inc. On the other hand, the testimony of the Government's witnesses establishes that legal title to this property was in either B. Glass Inc. or the Majestic Factors Corporation.

There is no satisfactory evidence that the Famous Furniture Co. Inc. had legal or equitable title to the property.

The property involved was located at Suffern, New York, at the place of business of B. Glass Inc. The name indicates that it was a separate and distinct corporation which the defendant Benjamin Goldberg testified he acquired in the "form of a purchase" (232). No details were furnished. Throughout the record the witnesses for the Government continuously drew distinctions between the business of the Famous Furniture Co. Inc. and B. Glass Inc. (R. 56, 62, 80, 81, 83, 84, 86, 91, 94, 101, 103, 107, 111, 114, 119, 176, 233, 236, 237, 240, 242, 328, 329, 333). The only evidence in the record that the Famous Furniture Co. Inc. had any interest in the property is the boast of the defendant Benjamin Goldberg that "everything that Ben. Goldberg did was on behalf of the Famous Furniture Company" (R. 233).

The Government does not contend that the restocking of B. Glass Inc. was at the suggestion or with the knowledge of the petitioner. In fact, the defendant Benjamin Goldberg, after restocking B. Glass Inc., first began negotiations with others to sell and dispose of the merchandise (R. 235-236). No petition in bankruptcy was ever filed against B. Glass Inc. This company is not mentioned at any place in the indictment.

The question of title to the merchandise is further complicated by the fact that the assets of B. Glass Inc. had previously been transferred to the Majestic Factors Corporation. A Government witness testified that on January 7, 1941, the assets of B. Glass Inc. were transferred to the Majestic Factors Corporation and all the income of B. Glass Inc. belonged to the Majestic Factors Corporation (R. 81-82).

While there was interjected into the record of this case some evidence that three loads of furniture were taken from the Famous Furniture Co. to the Bergen Furniture Co. (R. 346), the circumstances surrounding this delivery are not explained in the record nor was this property ever identified. Moreover, the petitioner's connection with this transfer, if any, is not clear. The Government's entire case was predicated upon the transfer of the property from the place of business of B. Glass Inc.

This fatal defect in the evidence—the failure of proof that the property involved actually belonged to the Famous Furniture Co. Inc.—required the acquittal of the petitioner of the crimes charged in the indictment.

B

A very vital question in this case, as recognized by the Learned Circuit Court below, was whether or not (assuming title remained in Famous Furniture Co. Inc. after the transfer to B. Glass Inc.) either Famous Furniture Co. Inc. or its trustee in bankruptcy nevertheless had any equity in the Suffern furniture. The proof is clear that before petitioner had any dealings with respect to this furniture it was transferred to Majestic Factors Corporation in return for a loan of $5,000. It is not apparent exactly what the nature of the "transfer" was. However, assuming it to have been in the nature of a lien or pledge, the burden rested squarely upon the Government to prove that Famous Furniture Co. Inc. or its trustee had an equity or property right in the furniture alleged to have been

transferred to the petitioner over and above the amount of the loan.

There was in fact no probative evidence to sustain this burden.

That the evidence actually adduced may be demonstrated mathematically to exclude any possibility that the bankrupt or its trustee had an equity or property interest in the furniture allegedly transferred to petitioner from Suffern has been pointed out in the foregoing petition. In addition to this, it is evident from the opinion of the learned Circuit Court below that that Court, after a careful review of the evidence, felt there had been no concrete offering by the Government to sustain its burden on this point and preferred to disregard the Government's purported proof to rest its affirmance of petitioner's conviction upon the assumption (which, owing to the lack of evidence, the Court itself was compelled to draw) that there must have been an equity, otherwise the lendor would not have received the furniture as security.

The patent error of relying upon such a conjectural and unwarranted assumption to support petitioner's conviction upon criminal charges is obvious and startling.

C

There is no evidence in the record that petitioner knew about the financial condition of the Famous Furniture Co. Inc. or that bankruptcy was contemplated. From all that appears from the testimony of Benjamin Goldberg, the petitioner heard that the defendant Benjamin Goldberg was selling the stock of B. Glass Inc. and that the petitioner was anxious to interject himself in this transaction (R. 236-237) to earn a commission (R. 375).

The record simply shows in this case a sale of the property of B. Glass Inc. at 90¢ on the dollar. The testimony of the defendant Benjamin Goldberg was to the effect that he sold the merchandise to the petitioner and the defendant Greenberg (R. 241-242). He is emphatic in his statement that "there was a sale agreed upon" (R. 249).

The sum and substance of the testimony of Benjamin Goldberg is his claim that he sold the merchandise but did not get paid (R. 243). Proof of the sale and the testimony of the alleged accomplices does not establish the crimes charged in the indictment.

In *United States* v. *Waldman*, 188 Fed. 524, District Judge Holt wrote as follows (p. 527):

> "The fact that the bankrupt's goods were removed by persons having no connection with the bankrupt has no tendency to show a conspiracy to induce the bankrupt to conceal the goods from the trustee. The two things inherently have no connection. The circumstances of the transaction, if stated, might show some connection; but, unless stated, no connection is apparent."

In *Bartkus* v. *United States*, 21 F. (2d) 425, the evidence showed that before the bankruptcy of a company some merchandise owned by the company found its way into the possession of certain defendants who were relatives of the president of the company. The defendant testified that they bought the merchandise. The Court, in reversing the judgment of conviction, wrote as follows (p. 427):

> "The fact that some merchandise which had been purchased by bankrupt (and also may have been sold by it) found its way into the possession of Kelps, Nevar and Dronsuth, even under the suspicious circumstances mentioned, does not go far to establish that they conspired with Bartkus to commit the crime charged. The record shows that the merchandise which found it way into this garage was not of large amount or value. Government's counsel say it was 'at least some'. No effort was made to take possession of it for the bankrupt."

D

The foregoing petition sets forth petitioner's grievance with respect to the charge of the Trial Court. Briefly repeated, petitioner contends that the Court submitted but

one issue to the jury for its determination with an instruction that if they found the affirmative of that issue, namely, that if petitioner had participated in the transactions testified to, their verdict must be one of guilt. The issue thus submitted was but one of several issues in this case that required proper framing by the Court and specific submission to the jury.

As has been pointed out, there was a grave issue of fact as to whether or not bankrupt or its trustee had any title to the Suffern property mentioned in the indictment. There was a grave issue as to whether or not, assuming the bankrupt or its trustee had a technical title, they had any equity or valuable property right in the Suffern furniture. And there was a grave issue as to whether or not, so far as petitioner was concerned, the entire transaction with respect to the Suffern furniture was simply a transaction of purchase and sale or whether it was a fraudulent transfer and theft.

Petitioner, under the Constitution, was entitled to have each and every one of these issues resolved by the jury, and it is evident that the Court's failure to frame and submit them to the jury was a clear violation of petitioner's constitutional right.

Nor can it be said that the Court's omission in this regard was not of the most vital importance to the petitioner, for it is evident that any one of these additional issues may have been decided by the jury in petitioner's favor, and that if so decided, the jury would have been required to return a verdict exonerating petitioner from the charges made against him.

It is true that assigned counsel for petitioner did not take exception to the Court's charge based upon the foregoing errors, but this technical omission ought not to be considered as foreclosing, once and for all, the petitioner's right to a full, fair and impartial trial by jury. Indeed, this Honorable Court time and again has enunciated and affirmed the principle that such technical omissions would

not avail to deprive a defendant in a criminal case of a substantial right.

Title 28, U. S. C. A., Sec. 391;
Weiborg v. *United States*, 163 U. S. 632, 658;
United States v. *Atkinson*, 297 U. S. 157, 160;
Brasfield v. *United States*, 272 U. S. 448, 450;
New York C. R. Co. v. *Johnson*, 279 U. S. 310, 318;
Crawford v. *United States*, 212 U. S. 183, 194.

The foregoing principle is especially applicable where, as in the present case, petitioner was represented upon the trial by assigned counsel not of his own choosing.

CONCLUSION

It is respectfully submitted that the questions raised in this case are of sufficient importance to require this Court to issue a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision made herein.

Respectfully submitted,

CHARLES V. HALLEY, JR.,
Attorney for Petitioner.

APPENDIX

Statutes

Title 18—United States Code

88. (Criminal Code, Section 37.) Conspiring to commit offense against the United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

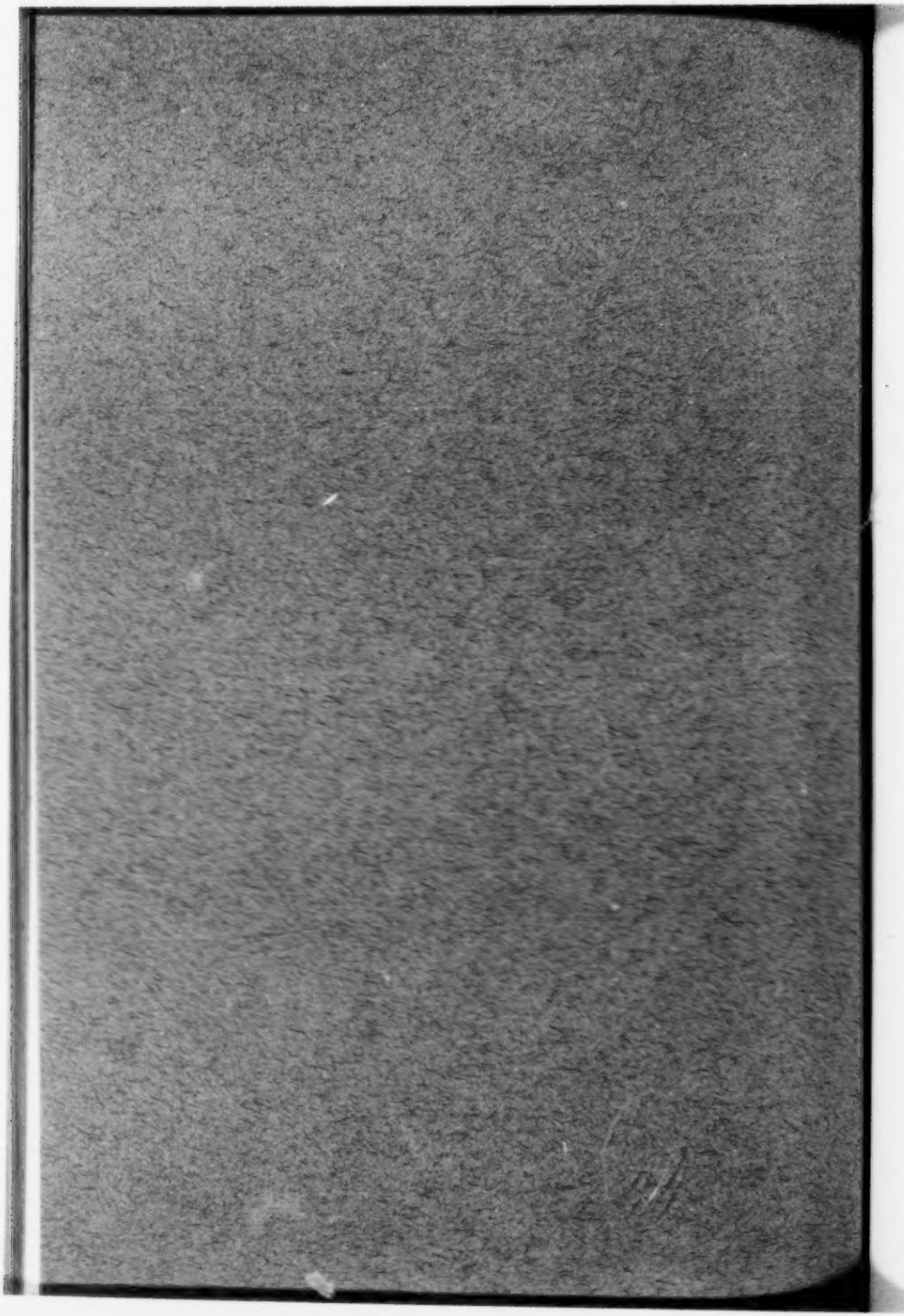
Title 11—United States Code, Bankruptcy Act

Sec. 52—Offenses.

(b) A person shall be punished by imprisonment for offense against United States.—If two or more persons than $5000, or both, upon conviction of the offense of having *knowingly and fraudulently* (1) *concealed* from the receiver, custodian, trustee, marshal or other officer of the Court charged with the control or custody of property, or from creditors in any proceeding under this title, any property belonging to the estate of a bankrupt; or (2) made a false oath or account in or in relation to any proceeding under this title; or * * * (6) while an agent or officer of any person or corporation, and *in contemplation of a proceeding under this title* by or against such person or corporation, *or with intent to defeat this title, concealed or, with or without concealment, transferred* any of the property of such person or corporation; * * *.

Title 28—United States Code

391. (Judicial Code, Section 269 amended.) New Trial, Harmless Error.—All United States Courts shall have the power to grant new trial in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the Courts of law on the hearing of any appeal, certiorari, Writ of Error, or motion for a new trial in any case, civil or criminal. The Court shall give judgment after an examination of the entire record before the Court without regard to technical errors, defects or exceptions, which do not affect substantial right of the parties (R. F. Section 726, March 3, 1911, Chapter 231, Section 269; 26 Stat. 1163, February 26, 1919, Chapter 40; Stat. 1181).



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568274—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 554

JULIUS ARONOFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 189–191) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered November 17, 1943 (R. 192). The petition for a writ of certiorari was filed December 21, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Crimi-

nal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence adduced at the trial on charges of transferring in anticipation of bankruptcy and concealing from the trustee in bankruptcy property belonging to the estate of the bankrupt, and of conspiring to do so, is sufficient to sustain the conviction of petitioner.

2. Whether in his instructions to the jury the trial judge erroneously failed to submit certain issues of fact for their determination.

STATUTES INVOLVED

Section 29 (b) of the Bankruptcy Act, as amended by the Act of June 22, 1938 (52 Stat. 855–856; 11 U. S. C. 52 (b)), provides in part:

> b. A person shall be punished by imprisonment for a period of not to exceed five years or by a fine of not more than $5,000, or both, upon conviction of the offense of having knowingly and fraudulently (1) concealed from the * * * trustee * * * charged with control or custody of property * * * any property belonging to the estate of a bankrupt * * * or (6) while an agent or officer of any person or corporation, and in contemplation of a proceeding under this Act by or against such person or corporation, or with intent to defeat this Act, concealed

> or, with or without concealment, transferred any of the property of such person or corporation * * *

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to the conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioner and Benjamin Goldberg, Harry Goldberg, and Meyer Greenberg were indicted in three counts in the United States District Court for the Eastern District of New York (R. 3–9). The first count charged that they unlawfully and knowingly conspired, in violation of Section 37 of the Criminal Code (18 U. S. C. 88), to violate Section 29 (b) of the Bankruptcy Act (11 U. S. C. 52 (b)) by transferring in anticipation of bankruptcy and concealing from the trustee in bankruptcy property in the amount of $36,000 which belonged to the estate of the Famous Furniture Co., Inc., the bankrupt. Six overt acts were alleged to have been committed in pursuance of the conspiracy. (R. 3–6.) Count 2 charged concealment of assets belonging to the estate of the bankrupt in

violation of Section 29 (b) (1) of the Bankruptcy Act (R. 6–8), and count 3 charged that while the two Goldbergs were officers of the bankrupt corporation, the defendants, in contemplation of a bankruptcy proceeding against the corporation and with intent to defeat the Bankruptcy Act, transferred corporate assets valued at $36,000 to petitioner and Greenberg, in violation of Section 29 (b) (6) (R. 8–9).

After a jury trial, petitioner was found guilty on all three counts (R. 165) and was sentenced to imprisonment for two years on each, the sentences to run concurrently (R. 12).[1] On appeal, the Circuit Court of Appeals for the Second Circuit affirmed the judgment in a *per curiam* opinion (R. 189–191).

The evidence adduced at the trial in support of the indictment may be summarized as follows:

The bankrupt, Famous Furniture Co., Inc., hereinafter referred to as Famous, conducted a retail furniture business in Brooklyn, New York (R. 61, 91, 190). Defendant Benjamin Goldberg was its president and secretary (R. 78) and defendant Harry Goldberg was vice president (R. 59).

Some time prior to the events dating from December 17, 1940, upon which the indictment was based, defendant Benjamin Goldberg purchased

[1] The other defendants pleaded guilty to count 1 (R. 10) and the remaining counts were dismissed as to them (R. 12).

the B. Glass, Inc., furniture store at Suffern, New York, on behalf of Famous (R. 78). Through a series of sales culminating in an auction on December 17, 1940, all of the stock of furniture and the fixtures of the Suffern store were sold at a considerable financial loss (R. 19, 113). Immediately thereafter the Suffern store was completely restocked with furniture taken from Famous' stock, which, according to the Goldbergs, had a cost price value of $15,000 (R. 30, 31, 59, 80). Famous then borrowed $5,000 from Majestic Factors Corporation, secured by the stock of the Suffern store, which at the time of the loan was inventoried at $14,500 (R. 27–29).

Thereafter, Benjamin Goldberg unsuccessfully undertook to dispose of the Suffern store's stock to a prospective purchaser (R. 79). At this stage, petitioner approached Benjamin Goldberg at the Famous store and stated that he understood that Goldberg needed money and that Goldberg had some merchandise at Suffern which he wanted to sell; petitioner offered to bring Goldberg into contact with a "wealthy associate" of his (R. 79). A meeting was immediately arranged, and petitioner introduced Goldberg to defendant Greenberg, who used the alias of Jack Sobel (R. 79–80). Petitioner, Greenberg, and Goldberg proceeded to the Suffern store where, after petitioner and Goldberg had checked the inventory (R. 80), the three "got into a huddle" and Goldberg was offered

$2,500 in cash, apparently as an inducement to "leave them the place, stock, lock and barrel"; it was further planned, according to Goldberg's testimony, that he "would get dollar for dollar for what was in there and that they were going to pull a fancy bust [2] and I [Goldberg] would still get out $30,000 and have my third interest" (R. 80).

The following day in New York, petitioner and Greenberg "worked out a deal" with Benjamin Goldberg whereby he was to receive "ninety cents on the dollar for all the" furniture in the Suffern store and they were to send trucks to transfer the furniture to an out-of-state buyer. Goldberg reserved from the deal the merchandise located on the ground floor of the store to cover the loan from Majestic Factors Corporation. Petitioner and Greenberg were to pay Goldberg for the stock when it was removed, and Goldberg was then to pay off the Majestic loan and permit them to remove the stock on the first floor. (R. 81.) Some time later, petitioner called on Goldberg at the Famous store and presented Goldberg with a bill of sale for the Suffern furniture, addressed "to whom it may concern," which he told Goldberg to sign, using a fictitious name. Goldberg did so. (R. 83.) With Goldberg's acquiescence (R. 37, 38, 81), furniture valued at $8,500 or $9,000 (R.

[2] At a later meeting among the three, petitioner and Greenberg boasted, "to hell with the creditors," we "have busted creditors for twenty-five years and know how to continue" (R. 97).

83) was removed from the upper floor and balcony of the Suffern store and taken to the Bergen Furniture Factory (hereafter called Bergen) in Brooklyn and to an unidentified warehouse in Brooklyn (R. 40, 41, 115, 116).[3]

During the course of these transactions and both before and after the removal of the furniture to Bergen's premises, petitioner made unsuccessful efforts to dispose of portions of it, and, at least on two occasions, doubt as to petitioner's ownership frustrated possible sales (R. 20–22, 47–49, 50).

During this period, petitioner, Benjamin Goldberg, and Greenberg had several meetings in a Brooklyn cafeteria with a view to arranging for the removal of furniture from the Famous store in Brooklyn (R. 84). Thereafter, in accordance with arrangements made at those meetings, the defendant Harry Goldberg removed the Famous store's label from a quantity of the store's stock of furniture and permitted a truck driver who identified himself with a previously arranged password to remove the furniture to the Bergen premises (R. 41, 60, 61, 115, 116). The furniture so removed had a cost price value of $20,000 (R. 61). Greenberg supervised the unloading of the furniture at the Bergen premises (R. 42).

[3] With the exception of $25 in retail sales (R. 34), there is no indication of the disposition made of the remaining furniture in the Suffern store. However, by the end of February 1941, the entire furniture stock at the store was gone (R. 29).

Petitioner testified on cross-examination that from January 1941 through March 31, 1941, Bergen sent furniture to one Pollock, a furniture auctioneer, and that Pollock paid for the furniture by checks made out to "A. Aronoff"[4] (R. (135–138).

Although petitioner testified that he was merely an employee of the Bergen Furniture Factory (R. 122), Benjamin Goldberg testified that petitioner had told him that he had $2,500 invested in Bergen and that Greenberg had $5,000 invested (R. 84, 87). Other evidence showed that petitioner originally leased the premises for the Bergen store (R. 134), that he and Greenberg offered to give Bergen to Benjamin Goldberg "as a substitute" for Famous (R. 87), and that petitioner was intimately connected with Bergen's finances (R. 134–142) until Bergen "failed" (R. 87).

On March 7, 1941, an involuntary petition in bankruptcy was filed against Famous in the United States District Court for the Eastern District of New York; it was adjudicated a bankrupt on March 29, 1941, and a trustee was appointed on August 21, 1941 (R. 17–18).

After the filing of the bankruptcy petition, petitioner, Greenberg, and Benjamin Goldberg met to discuss the bankruptcy hearings, and both petitioner and Greenberg "cautioned" and "warned"

[4] "A" is petitioner's wife's initial (R. 135).

Goldberg "not to mention anything about the transaction with them, that they had power in the furniture industry and controlled the situation" (R. 86). Thereafter, pursuant to prior commitments to the Goldbergs, petitioner and Greenberg organized and financed the Melvin Furniture Co., and the Goldbergs were placed in control of the operation of the store (R. 61, 62, 63, 72). Petitioner advised Harry Goldberg to "stop worrying about the Famous affairs; it would be straightened out; nothing to worry about" (R. 65).

An F. B. I. accountant who audited Famous' books testified that on January 1, 1941, Famous had a deficit of $64,837.86 and was insolvent in the amount of $19,837.86 (R. 109). The books reflected a merchandise shortage of $36,010.30 (R. 109) and showed that merchandise valued at $4,514.30 was shipped from Famous to the Suffern store, but the accountant's audit revealed that more loads of furniture were shipped than were accounted for in the books (R. 110). The books did not reflect any sales to petitioner, the receipt of any payment from petitioner or Greenberg (R. 114), or the transfer of any furniture to Bergen (R. 112). It was stipulated that the trustee in bankruptcy received no furniture or payment of any kind from petitioner or Greenberg (R. 18).

ARGUMENT

I

Petitioner asserts (Pet. 7–11, 16–22) that there was no proof (a) that Famous, the bankrupt, had any legal or equitable interest in the furniture removed from the Suffern store, or (b) that petitioner had knowledge of Famous' financial condition or of its interest in that furniture, and that for these reasons the evidence is insufficient to support the verdict. There is no merit in these contentions.

(a) Irrespective of the proof concerning Famous' interest in the Suffern furniture, it is not disputed that Famous owned the furniture which was removed directly from its store to the Bergen premises. Contrary to petitioner's contention (Pet. 11, 19), there was ample evidence that he was implicated in this transfer, and, moreover, that it represented but one phase of the scheme to transfer and conceal assets of Famous. As shown in the Statement, *supra*, p. 7, following the meeting at the Suffern store, at which plans were developed for the removal of the furniture stocked there, petitioner and Greenberg held further meetings with Benjamin Goldberg to arrange for the transfer of furniture from Famous' store in Brooklyn to Bergen's premises. A quantity of furniture from which Famous' labels had been removed was thereafter taken

from its store to Bergen's by a truck driver who identified himself with a previously arranged password. The evidence pertaining to this transaction, together with the other proof concerning the fraudulent nature of the entire deal, is, as the court below said (R. 190–191), alone sufficient to sustain the conviction.

As to the furniture removed from the Suffern store, the evidence plainly showed that Famous had a legal or equitable interest therein, either of which is sufficient to support the charges of the indictment. *United States* v. *Schireson,* 116 F. (2d) 881 (C. C. A. 3); *Goetz* v. *United States,* 59 F. (2d) 511 (C. C. A. 7), certiorari denied, 287 U. S. 649. Although the Suffern store was operated under its former name of B. Glass, Inc., after its purchase by Benjamin Goldberg on behalf of Famous, it is apparent that the store was in fact but a branch of Famous and it was so treated by the latter's officers (see, *e. g.,* R. 78). Thus, receipts from the Suffern close-out sale and auction in December 1949 were turned over to Famous and recorded in its books (R. 78). Thereafter, when it was decided to restock the Suffern store, Goldberg moved a portion of Famous' stock of furniture to Suffern (R. 80). Petitioner does not contend that Famous did not originally own this furniture, but he seeks to infer a transfer of title to B. Glass, Inc., from the mere transfer of furniture to the Suffern store (Pet. 7–8).

However, in view of the Goldberg brothers' testimony concerning the manipulations of the merchandise in the Famous and Suffern stores (R. 59, 79–83; see p. 5, *supra*) and the absence of any proof tending to show a transfer of title, the jury was warranted in concluding that the stock of furniture in the Suffern store was actually Famous' property. Cf. *United States* v. *Shapiro*, 101 F. (2d) 375 (C. C. A. 7), certiorari denied, 306 U. S. 657.

The subsequent financing transaction whereby Famous borrowed $5,000 from Majestic Factors Corporation, using the furniture in the Suffern store as collateral, plainly did not divest Famous of its property interest in the furniture. While it is not clear from the evidence whether legal title was transferred to the lender (R. 27–28), or the lender was merely given a security lien (R. 81), Famous retained at least a substantial equity in the furniture, for, although it was inventoried at $14,500 (R. 29), the loan was for only approximately one-third of that amount. Petitioner assails (Pet. 10–11, 19–20) this conclusion, which the court below also reached (R. 290), on the ground that Famous' books showed that furniture valued at only $4,514.30 was shipped to the Suffern store. But the audit of Famous' books by William Crawford, the F. B. I. accountant, revealed that more loads of furniture were shipped to Suffern than were accounted for in the books

(R. 110). And Crawford's conclusion in this regard is corroborated by the testimony of the Goldbergs that the furniture in the Suffern store was inventoried at about $15,000 (R. 59, 80) and the further testimony of the credit manager of Majestic Factors Corporation, the lender, that it had a value of $14,500 (R. 29).

(b) Regardless of petitioner's contention that there was no evidence that he knew of Famous' interest in the furniture in the Suffern store and of Famous' financial difficulties, there was, as we have already shown (*supra*, pp. 10–11), ample proof that he was implicated in the transfer of a quantity of furniture directly from Famous' store to Bergen's premises. After the filing of the bankruptcy petition, petitioner and Greenberg discussed the prospective bankruptcy hearings with Benjamin Goldberg and warned him not to mention his transactions with them (R. 86).[5] It is thus clear that petitioner knew of the bankruptcy

[5] Benjamin Goldberg also testified that following his arrest he met with petitioner and Greenberg and that petitioner told Greenberg that Greenberg was "just as guilty as anybody and that he must chip in $500 so Ben [Goldberg] could get his composition" with his creditors (R. 89–90). Harry Goldberg testified that in January 1947, after he had pleaded guilty and petitioner was awaiting trial (see R. 10–11), petitioner told him "that I [Goldberg] had no right to go to the FBI. That if I had come to him, he would have contacted Meyer Greenberg and would have seen to it that my family would get fifty dollars a week and if necessary I would take the blame for something I had never done," meaning "the Famous Furniture bankruptcy" (R. 66).

proceeding and that he was a party to the concealment of this lot of furniture from the trustee.[6]

Apart from this aspect of the case, however, the evidence is clear that petitioner knew of Famous' financial difficulties, which culminated in the bankruptcy, and that Famous owned the furniture in the Suffern store. When petitioner first approached Benjamin Goldberg at the Famous store in Brooklyn, he knew that Goldberg "need[ed] money" and that Goldberg had "some merchandise at Suffern" which he wanted to sell (R. 79). Petitioner had had prior business dealings with Famous (R. 122), and, according to Goldberg's testimony, "everything that Ben Goldberg did was on behalf of the Famous Furniture Company" (R. 78). At the subsequent meeting in the Suffern store, petitioner, Goldberg, and Greenberg planned "to pull a fancy bust" (R. 80) and later petitioner and Greenberg boasted that they had been "busting" creditors over a long period of time (R. 97). Some time later, Greenberg and petitioner loaned Goldberg $2,500, and petitioner deposited his share of the loan in Famous' bank account, returning the bank book

[6] The proof in this regard is sufficient to sustain the conviction under the second count of the indictment charging concealment of assets from the trustee. In respect of this count, it is immaterial whether petitioner knew of Famous' financial difficulties prior to the bankruptcy. Since the sentences on the three counts were ordered to run concurrently (R. 12), the conviction on the second count is sufficient to sustain the judgment. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105, and cases cited.

to Famous by mail (R. 81–82). Following the consummation of the deal, and as part of it, petitioner and Greenberg set up a new furniture business under the Goldbergs' management (R. 61, 62, 63, 72).

This evidence, viewed in the light of the other evidence summarized in the Statement, *supra*, pp. 5–9, clearly shows that petitioner had intimate knowledge of Famous' financial affairs and its interest in the Suffern store and that he had an active part in the execution of the fraudulent scheme upon which the charges of the indictment were founded.[7]

II

Relying solely upon an excerpt from the trial judge's instructions to the jury, petitioner contends (Pet. 12–13, 21–22) that the judge erroneously limited the jury's consideration to the question whether petitioner participated in the transactions described in the testimony and failed to submit to the jury the questions whether the bankrupt had any property interest in the Suf-

[7] Petitioner's further contentions (Pet. 10, 20) that the evidence shows merely that he was a "contact" man for Greenberg and that there was a legitimate sale of the Suffern furniture are specious. The proof is clear that they and Benjamin Goldberg planned a "bust" of Famous' creditors and that the purported sale was merely a device to enable petitioner to dispose of the furniture (*supra*, pp. 6–7). Famous' books showed no sale to petitioner, Greenberg, or Bergen (R. 112, 114), and Famous never received any payment for the furniture (R. 85, 114).

fern furniture and whether the transaction in respect of that furniture was a sale. A reading of the charge as a whole, however, negates petitioner's contention.

The judge read to the jury the statutory language upon which the indictment was founded and then paraphrased it by emphasizing "that it is unlawful to conceal from the Trustee property that belongs to the estate of the bankrupt" or to conceal "any property of the corporation by transferring it prior to bankruptcy" (R. 156–157). He then summarized the indictment (R. 157–160), advising the jury that it charged, *inter alia*, that the defendants transferred and concealed property which it was alleged "belonged to the Famous Furniture Company, Inc.," and which after March 7, 1941, "belonged to the estate of the bankrupt" (R. 158, 159–160). After instructing the jury concerning the presumption of innocence and the burden of proof (R. 160), the judge fairly reviewed the evidence on both sides (R. 160–163). Before permitting the jury to retire, he offered counsel an opportunity to request additional instructions (R. 164). Although there was one exception to the charge as given and further exceptions to the judge's denial of requested additional instructions, petitioner's trial counsel did not, as petitioner concedes (Pet. 22), request instructions on the questions which he now contends should have been specifically called to the jury's attention, nor did he except to the charge in that regard (see R. 164–165).

Moreover, the Suffern furniture, in respect of which petitioner contends the instructions were deficient, was, as we have shown (*supra*, pp. 10–11, 13–14), only a part of Famous' furniture involved in the scheme; Famous' title to the other furniture involved is not disputed. Since the evidence is amply sufficient to support the verdict, and since petitioner did not except to the instructions in the particulars of which he now complains, no ground for reversal is established. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238–239; *Holmgren* v. *United States*, 217 U. S. 509, 523, 524; *Allis* v. *United States*, 155 U. S. 117, 122.

CONCLUSION

Petitioner had a fair trial and his conviction is adequately supported by the evidence. No question is presented which warrants review on certiorari, and there is no conflict of decisions. It is, therefore, respectfully submitted that the petition should be denied.

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TOM C. CLARK,
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JANUARY 1944.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 554

JULIUS ARONOFF,
Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITIONER'S REPLY BRIEF

CHARLES V. HALLEY, JR.,
Attorney for Petitioner.

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PETITIONER'S REPLY BRIEF

Argument

A

The United States in its brief in opposition to the present application for a writ of certiorari has, to a considerable extent, abandoned its original efforts to substantiate the petitioner's conviction on the basis of the transfers of merchandise from B. Glass Inc., in Suffern, N. Y., to the premises of Bergen Furniture Factories, Inc., in Brooklyn, and now seeks to support the conviction on the basis of some incidental transfer or transfers of merchandise shown to have been made from the premises of Famous Furniture Co. in Brooklyn, to the Bergen Furniture Factories, Inc.

Petitioner did not discuss these last mentioned transfers in his original brief for the reason as was pointed out by him, the record did not show his participation therein or

knowledge thereof. Mention is again made of these transfers from Famous to Bergen for the reason that the United States in its opposing brief, pursues the argument that petitioner participated in these transfers and that consequently his conviction should be affirmed on the basis of them alone.

In substantiation of this line of reasoning, the United States at page 7 of its brief in opposition, and again at pages 10 and 13, refers to various pages of the record as containing testimony showing petitioner's implication in the direct transfers of merchandise from the Famous to the Bergen. Counsel for the petitioner have carefully examined the pages of the record referred to and respectfully submit to the Court that they do not substantiate the Government's interpretation of the record, and that on the contrary, they wholly fail to show the petitioner's participation in these latter transfers.

In the circumstances, if petitioner's conviction is to be upheld at all, it must be held upon the Government's original theory that the so-called Suffern transfers and the petitioner's participation therein established his guilt of the crimes alleged in the indictment.

B

With respect to the Suffern transfers, the brief of the United States in opposition, will serve only to bear out petitioner's original contention that there were a number of issues raised by the evidence, each of which was required to be clearly framed and submitted to the jury for its determination before it could be said that petitioner had been accorded a full trial of the charges leveled against him. Thus on the issue of whether or not the merchandise in question in fact belonged to the Famous Furniture Co., at the time of its removal from the premises of B. Glass Inc., the Government at pages 11 and 12 of its brief, clearly recognizes that this question presented a substantial

issue for the jury's determination, and that had the jury found that title had in fact passed to B. Glass Inc., the finding would have required a dismissal of the charges against petitioner.

Again, at pages 12, 13 and 14 of its brief, the Government clearly recognizes the existence of the additional issues pointed out by petitioner in his main brief, namely, whether or not, assuming title did remain in the Famous Furniture Co. after the delivery of the merchandise to Suffern, Famous continued to have any title or equity in it after the loan from Majestic Factors Corporation; and whether or not the petitioner in fact had any knowledge of Famous Furniture Company's interest in the furniture in the Suffern store at any time, or of Famous' precarious financial condition.

All of these issues ought to have been properly framed and submitted to the jury by the Trial Court, and it is repeated that the failure of the Trial Court to do this, was a very real and serious deprivation of the petitioner's right to have the issues raised by the charges made against him, fully considered and determined by a jury of his peers.

The Government's present argument that the Trial Judge's procedure in submitting to the jury only the question of whether or not petitioner participated in the transaction shown by the evidence, was not prejudicial to petitioner because the Court had previously read to the jury the Statutes upon which the indictment was based, and explained in a general way the meaning and application of those Statutes, is untenable.

Clearly a mere general reference to the Statutes and the indictment is not in any sense a framing of the issues for the jury, and cannot cure a failure to frame and submit the issues fully and properly. This is particularly true and particularly prejudicial where, as in the present case, the Trial Judge does in fact clearly frame one of the several issues involved, and in so doing, implied to the jury that the issue so framed is the sole question presented by the entire evidence for its determination.

The gravity of the Trial Judge's omission in this regard is indeed heightened by the form of the jury's ultimate verdict, which the jurors accompanied with a plea of leniency for petitioner (R. 165).

It is not an unreasonable conclusion that the jurors' plea of leniency resulted from the fact that they found there was something in the case favoring the petitioner, but felt constrained to return a verdict of guilt because of the limitation imposed upon them by the Court's charge to the effect that petitioner's participation or lack of participation in the transactions, was the sole question for their consideration, and because, in consequence, they did not feel free to consider any other question in arriving at their verdict.

It is the Government's contention, however, that regardless of how prejudicial these omissions in the Trial Judge's charge may have been to petitioner, he is, nevertheless, forever foreclosed of his right to a full trial of the issues because petitioner's assigned counsel upon the trial omitted to take exception to the charge. In support of this claim, the Government cites *Cf. United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238-239; *Holmgren* v. *United States*, 217 U. S. 509, 523, 524; *Allis* v. *United States*, 155 U. S. 117, 122, none of which support the Government's argument in this respect.

A reading of the cases cited will show that each of them revolved about some distinct point and contrary to supporting the Government's position, they in fact affirm the principle forwarded in petitioner's main brief. That "Appellate Courts in the public interest may of their own motion, notice errors to which no exception has been taken if the errors are obvious or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings". (*United States* v. *Atkinson*, 297 U. S. 13, 157, 160; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239.)

Conclusion

It is respectfully submitted that the questions raised in this case are of sufficient importance to require this Court to issue a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision made herein.

Respectfully submitted,

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